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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-15

THE CREEK NATION,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner, the Creek Nation of Indians of the State of Oklahoma, respectfully petitions the Court to grant a writ of certiorari to the United States Court of Claims to review its Order of April 4, 1978, affirming on appeal the opinion and findings of the Indian Claims Commission on the value of the lands involved, entered on February 17, 1977 (39 Ind. Cl. Comm. 383-434), and its final award thereon entered on April 6, 1977 (40 Ind. Cl. Comm. 90).

OPINIONS BELOW

The final order of the Court of Claims, dated April 4, 1978 is not as yet reported (___ Ct. Cl. ___), and is printed as Appendix C to this petition. The opinion, findings, and interlocutory order of the Indian Claims Commission on valuation entered on February 17, 1977 (39 Ind. Cl. Comm. 373-434); and the final award entered by the Indian Claims Commission entered thereon on April 6, 1977 (40 Ind. Cl. Comm. 90), are printed as Appendices D and E to this petition. The opinion, findings, and interlocutory order of the Indian Claims Commission determining liability under Section 2, Clause 5 of the Indian Claims Commission Act (24 Ind. Cl. Comm. 238-269 (1970)), are printed as Appendix F to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of the Indian Claims Commission Act of August 13, 1946, c. 959, Pub. Law 79-726, §20(c), 60 Stat. 1049, 1055-1056 (25 U.S.C. 70s(c)), as supplemented and amended by Act of September 8, 1960, Pub. Law 86-722, 74 Stat. 821, 829 (25 U.S.C. 70s(c)); the Act of October 8, 1976, Pub. Law 94-465, 90 Stat. 1990, entending the life of the Indian Claims Commission Act until September 30, 1978, and transferring all remaining unsettled claims to the United States Court of Claims for final disposition; and also under 28 U.S.C. §1255. Said Section 20(c) of the Indian Claims Commission Act is printed as Appendix G to this petition.

The Indian Claims Commission Act was amended and extended to April 10, 1972 by Acts of July 24, 1956, c.

679, Pub. Law 70-767, 70 Stat. 624, and June 16, 1961, Pub. Law 87-48, 75 Stat. 92, by Act of April 10, 1967, Pub. Law 90-9, §1, 81 Stat. 11; and to April 10, 1977 by Act of March 30, 1972, Pub. Law 92-265, §1, 86 Stat. 114; and finally by Act of October 8, 1976, Pub. Law 94-465, 90 Stat. 1990, the life of said Indian Claims Commission Act was extended to September 30, 1978, and provided that all unsettled claims thereafter be transferred to the United States Court of Claims for final disposition under the provisions of Section 2 of said Indian Claims Commission Act. Said Act of October 8, 1976 is printed as Appendix H to this petition.

AUTHORITIES INVOLVED

The Original Creek Agreement between the United States and the Creek Nation, ratified by Act of March 1, 1901, c. 676, 31 Stat. 861, which incorporated by reference therein Section 21 of the Curtis Act, approved June 28, 1898, c. 517, 30 Stat. 495, and Section 2 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 138, the pertinent parts of which are printed as Appendix I to this petition.

Also Sections 2 and 20(b), (c), of the Indian Claims Commission Act (25 U.S.C., 70a and 70s(b), (c)), the pertinent parts of which are printed as Appendix G to this petition.

QUESTIONS PRESENTED

1. In its review of this fair and honorable dealings case did the Court of Claims fulfill its appellate function under the directive of Congress set forth in Section 20(b) of the Indian Claims Commission Act, when it failed to review specifically the issues raised by appellant, that the

Indian Claims Commission made findings contrary to the record, made inconsistent findings, and failed to make findings of substantial evidence that would reflect the entire record; when said Order of April 4, 1978 merely concluded generally that it "has considered the record, the briefs, and the oral argument, and now rejects appellant's appeal and affirms the Commission", without analyzing the issues thus raised on appeal. (Appendix C, p. 23a).

2. Did the Court of Claims on the appeal in this case err in failing to direct the Indian Claims Commission to apply to this fair and honorable dealings case, in which a special fiduciary relationship existed between the United States and the Creek Nation, the same measure of damages the Court of Claims authorized the Commission to apply in the similar *Seminole Nation v. United States*, 203 Ct. Cls. 637 (1974), and particularly footnote 11, at page 654, wherein the Court of Claims held that the claimant, in a fair and honorable dealings case, is not bound by strict "legal rights", and that the Commission could award as a part of damages due claimant the value of the lands and also the income therefrom, even though said income developed after the date the lands were lost through the breach of trust by the United States, the guardian; and especially when the Commission exercised its discretion in the *Seminole* case by directing in its Order of March 17, 1976 (37 Ind. Cl. Comm. 499), that the income lost the claimant "beyond fair market value" be included as a part of damages "necessary to provide '. . . an appropriate and equitable measure of redress under clause 5' ", citing the *Seminole* case.

3. Did the Court of Claims err in holding that the decision in *Makah Tribe v. United States*, 40 Ind. Cl. Comm. 131 (1977), is not applicable to this Creek case,

said *Makah* case being a similar fair and honorable dealings case, in which a "special fiduciary relationship" existed between the United States and the Indian claimant under an agreement; and wherein the United States, the guardian, breached the trust agreement, and the Commission held that the Makahs were entitled to recover as damages the value of the rights lost as the result of the breach of trust, and also the income therefrom.

4. Did the Court of Claims err in failing to hold that in this fair and honorable dealings case, in which a "special fiduciary relationship" existed between the United States and the Creek Nation, wherein the United States, as guardian, breached the trust agreement and created the losses complained of herein to the dependent Indian ward, in refusing to hold that the ward should recover, under established precedents, the value of the lands thus lost to the ward, and also the income in the form of royalties from oil and gas extracted therefrom, similar to the damages that a court of equity would award under the equitable doctrine of tracing.

5. Did the Court of Claims err in failing to hold that the Indian Claims Commission abused its discretion in deciding the issue of the value of the Creek lands involved herein, and in refusing to include as a part of damages the income that the Indian ward would have received from said lands, except for the breach of the trust agreement committed by the United States, the guardian.

STATEMENT OF THE CASE

In this case the Indian Claims Commission determined in its trial on liability, under Section 2, Clause 5 of the Indian Claims Commission Act (25 U.S.C. 70a(5)), author-

izing the adjudication of "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity", that the United States is liable to the Creek Nation for the losses sustained by it as a result of (1) the Government's breach of the fiduciary duties it assumed in administering the provisions of the Creek Agreement of March 1, 1901, 31 Stat. 861; and (2) its enrollment of third persons, not entitled to such enrollment on the final rolls of the Creek Nation, thus erroneously allotting to each of said persons a total of 160 acres of Creek tribal lands. The issue of liability has thus been established. (24 Ind. Cl. Comm. 238 (1970); Appendix F. pp. 79a-111a).

Thereafter, at the valuation trial to determine the amount of recovery due the Creek Nation, the parties agreed (1) that the United States had erroneously enrolled 142 persons on the Creek tribal rolls, and allotted to each of them approximately 160 acres of Creek tribal lands, totaling 22,737.21 acres; and (2) that the Government breached the "special fiduciary relationship" on March 4, 1907, when the Creek tribal rolls became final, and the errors thereon could not thereafter be corrected.

On February 17, 1977, 39 Ind. Cl. Comm. 383-434 (1977); (Appendix D, p. 27a), the Commission determined that the 142 erroneous allotments, totaling 22,737.21 acres, had a fair market value on March 4, 1907, of $430,324.65, or $18.92 an acre. for agricultural, grazing and townsite purposes; and that the known and potential oil and gas deposits under these lands increased the fair market value thereof by the amount of $550,000.00.*

* The findings and determination of the value of the coal deposits underlying these Creek lands, in the amount of $110,000.00, determined by the Commission; and the amount of Creek tribal funds erroneously paid to the erroneous enrollees, some $25,381.55, were accepted by the Creek Nation, and not appealed from. The total judgment entered, including all items valued was $1,115,706.20. *Creek Nation v. United States,* 40 Ind. Cl. Comm. 90 (1977); Appendix E.

Petitioner appealed from the above determinations of value to the United States Court of Claims. The United States did not cross appeal. Petitioner on appeal raised the issue that the findings of the Commission were so incomplete that they did not include substantial evidence on value based on and reflective of the record as a whole; that the Commission made findings contrary to the record; and that such errors constituted reversible error, sufficient to return the case to the Commission for further proceeding. *Miami Tribe of Oklahoma v. United States,* 146 Ct. Cls. 421, 447, 465, 469 (1959); *Snake or Piute Indians v. United States,* 125 Ct. Cls. 241, 255, 286-287 (1953); *Seminole Nation v. United States,* 316 U.S. 286, 300 (1942). In its order of April 4, 1978 (Appendix C, p. 22a), the Court of Claims failed to analyze the issues thus raised on petitioner's appeal, which we submit it had a duty to do under Section 20(b), of the Indian Claims Commission Act (25 U.S.C. 70s(b)); (Appendix G, p. 112a).

The record discloses the nature of the 142 Creek tracts involved herein. They were valuable for agricultural development, and also for the mineral deposits underlying them (39 Ind. Cl. Comm. 383, 390, 401-408, 410-414, 421-429; Appendix D, pp. 27a-74a).

Had the Indian Claims Commission followed the long established precedents of many prior Indian land valuation cases, and recognized as substantial evidence the valuable data contained in the Soil Surveys of the U. S. Department of Agriculture of the Counties of Oklahoma, cover-

ing the 142 Creek tracts in question, the Commission's ultimate conclusion of the surface value of said tracts would have been over three times the value so determined, as set forth above.

Had the Indian Claims Commission, in determining the value of the oil and gas interests in the 142 Creek tracts, followed the precedent established in *Seminole Nation v. United States,* 203 Ct. Cls. 637, 654, n. 11 (1974), as supplemented by the Order of the Indian Claims Commission therein of March 17, 1978 (37 Ind. Cl. Comm. 499, 500; Appendix J, p. 121a), the valuation due the Creek Nation would also have included recovery as a part of the damages resulting from the Government's breach of the "special fiduciary relationship", the income in the form of royalties of one-eighth of the oil and gas actually produced from 63 producing tracts, amounting to $6,284,578.61 (Appendix M, p. 133a).

Petitioner submits that the failure of the Court of Claims to analyze the issues raised on appeal, and to remand this case to the Indian Claims Commission with directions that it follow the established precedents in the above respects, is error, and forms the basis upon which this court, in the interest of equal treatment under the law, should now provide the remedy.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Generally the Order of the Court of Claims of April 4, 1978, appealed from, conflicts with other precedents it has established in similar Indian claims cases, and has thus sanctioned a departure of established principles by the Indian Claims Commission in valuing Indian lands. Furthermore, the important question of the measure of damages to be

awarded by said Commission to the Indian ward in fair and honorable dealings cases, in which there existed a "special fiduciary relationship" between the United States, as guardian, and the defendant Indian ward, under an agreement, wherein the guardian breached said trust agreement, has never been decided by this Court.

We review these matters briefly below.

Under Question 1

The Court of Claims failed to review the issues raised by petitioner that the Indian Claims Commission made findings contrary to the record, made inconsistent findings, and failed to make findings on material issues of substantial evidence that would reflect the record as a whole, as the Court has done in many cases, including *Snake or Piute Indians v. United States,* 125 Ct. Cl. 241 (1953); *Miami Tribe of Oklahoma v. United States,* 146 Ct. Cl. 421 (1959).

Where a Court or a Commission makes findings contrary to the record, makes inconsistent findings, and fails to make findings of substantial evidence on material issues of fact that would reflect the substantial evidence in the record as a whole, the appeals court, as in the above cited cases, would reverse the case and remand it to the lower tribunal to correct these errors. See also *Seminole Nation v. United States,* 316 U.S. 286, 300 (1942). The Court herein has failed to follow its own well established precedents governing review in Indian claims cases, under Section 20(b) of the Indian Claims Commission Act. (Appendix G, pp. 112a-113a).

Under Question 2

The Court of Claims herein failed to apply to this case its decision in the similar case of *Seminole Nation v. United States,* 203 Ct. Cl. 637 (1974), and particularly footnote 11, at page 654, in which the United States, the guardian, gave away to third parties Seminole tribal lands without providing compensation therefor. This *Seminole* Case involved a breach of the "special fiduciary relationship", and was also a fair and honorable dealings case, based upon Section 2, Clause 5 of the Indian Claims Commission Act, which provides that the Commission is authorized to adjudicate "(5) claims based upon fair and honorable dealings that are not recognized by any existing rules of law or equity." Footnote 11, of the above decision provided:

> "The defendant is very wide of the mark when it urges that appellant has no standing under the fair and honorable dealings clause (clause 5) to point to railroad activities after March 1, 1909, because the abandoned station reservations became vested as a matter of law, under the 1906 Act, in the adjoining owners or the municipalities on that date. Clause 5 is not limited to legal rights, and the Nation can show that the destruction of its legal rights, as of March 1, 1909, even if constitutional, caused it injury which should now be redressed in fair measure under that provision of the Claims Commission Act. If the railroad's gains after March 1909 are taken into account, it will not be because appellant is 'legally' entitled to such sums but because those gains are considered an appropriate and equitable measure of redress under clause 5."

As the Court in its Order of April 4, 1978 herein pointed out, the Court gave the Commission discretion to award the proper measure of damages. In its opinion, at page 654, it stated:

> "* * * We leave to the Commission on remand to determine the appropriate compensation – whether it should be fair value as of the date of vesting in the towns and cities, the rents and profits derived from the lands, a combination of both standards, or some other measure."

Thereafter, in its order of March 17, 1976 (37 Ind. Cl. Comm. 499), the Commission exercised its discretion in favor of the submission of evidence that would reflect an award of damages which would include the value of the lands lost by the Indian ward, and in addition thereto the income lost to the Indian ward, in the following language:

> "3. The determination of the quantum of damages, if any, beyond fair market value of the plaintiff's interest in the station reservation lands as of June 30, 1909, necessary to provide '. . . an appropriate and equitable measure of redress under clause 5' (*see Seminole Nation v. United States,* 203 Ct. Cl. 637, 654 N. 11 (1974)), shall be made by the Commission as part of its decisions in the valuation phase of this docket."

We submit that the above action of the Commission has established a precedent for the present proceedings. Its action indicates that income lost by the Indian ward from a breach of trust by the United States, the guardian, even though it developed after the date the lands were

lost through the breach of trust, should be included as a part of the damages to be awarded the Indian ward.

Had these lands not been lost to the Indian ward, it could have leased them for oil and gas development in 1907 for large cash bonuses, and recovered income therefrom in the form of royalties of one-eighth of the oil and gas produced from said lands involved herein. (Appendix M, p. 133a).

As this Court stated in *United States v. Creek Nation,* 295 U.S. 103 (1935), at page 110:

> "True, the tribe, if free and prepared to proceed in its own behalf, might have successfully assailed the disposals; but it was not in a position where it could be expected to assume that burden. It was in a state of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests. * * *"

It is, accordingly, submitted that the precedent thus established in the *Seminole* case, should have been applied in the present Creek proceedings.

Under Question 3

We submit that the decision in *Makah Tribe v. United States,* 40 Ind. Cl. Comm. 131 (1977), should have been applied to the present proceeding. The *Makah* case was a fair and honorable dealings case, in which a "special fiduciary relationship" existed between the United States, as guardian, and the Makah tribe, the Indian ward. The United States breached the trust agreement (treaty), and the income lost to the Indian ward was directed by the Commission to be included as a part of damages due it.

Petitioner contends that the principle established as precedent in the *Makah* case, is equally applicable to the present proceedings.

The Court's order of April 4, 1978, appealed from herein, states in part (Appendix C, p. 24a):

> "* * * This is a land case and thus far the uniform practice has been in all 'takings' of land (again, in the non-eminent domain sense) under the 'fair and honorable dealings' clause, to use the fair value of the 'taken' land as of the date of 'taking' ".

The cases referred to by the Court were those in which the United States acquired lands from an Indian tribe, in the absence of some specific language in a treaty, agreement or statute spelling out a "special fiduciary relationship", and in which the Court seems to have meant merely that the relationship between the Indians and the Government is "similar to" or "resembles" such a relationship. *Gila River Pima-Maricopa Indians, et al. v. United States,* 135 Ct. Cl. 180, 189 (1956). However, we distinguish the decisions in those cases from the present proceedings, in which the United States took over full control, custody and management of the property and affairs of the Creek Nation under an express agreement, and breached this "special fiduciary relationship" by giving away to third persons Creek tribal lands in violation of the trust agreement. (24 Ind. Cl. Comm. 238, 246-251 (1970); Appendix F, pp. 88a-93a). The difference between the two sets of cases is obvious.

Under Question 4

In a fair and honorable dealings case, based solely upon moral grounds, and not bound by existing rules of law or equity, should the measure of damages be at least what a court of equity would decree under the equitable doctrine of tracing? In such a case the guardian has breached the trust agreement and has created the resulting loss to the ward. Under the doctrine of tracing, the ward can follow the trust property and recover it, or its value, together with the income derived from the lands or other property after the time of the breach of trust. Bogert, on Trusts and Trustees (2nd Ed.), Sec. 921, at pages 300-302.

In the present proceedings, each one of the 142 separate erroneous allotments of Creek tribal lands has been examined and traced. Where there has been actual oil and gas production from a tract, the resultant royalties have been determined, insofar as production records are now available. (Appendix M, p. 133a). A total of 75 of these tracts produced oil or gas, but the production records of only 63 of the tracts could now be found, and the early production records of some of the producing tracts could not be found. (Appendix M, p. 133a). The Commission found that of the 142 tracts involved in this case, ten had oil and gas leases on them by the year 1907; thirty-one more were leased between 1908 and 1910; and sixty-one others were leased by the year 1915. (39 Ind. Cl. Comm. 383, 429; Appendix D, pp. 70a-71a).

We believe that the damages to be awarded in this case should include not only the value of the lands thus lost, but also the income thus lost to the Indian ward in the form of royalties on oil and gas extracted from said tracts, to make the Indian ward whole as of today for the loss of these lands in 1907, as provided in the Commission's

Order of March 17, 1976, paragraph 3, in the *Seminole* case, *supra*, (Appendix J, p. 121a). When thus lost through the breach of trust by the guardian, oil and gas underlaid the producing tracts, and the value of the lands and the income therefrom in the form of royalties on the oil and gas produced would represent the full damages due the Indian ward resulting from the breach of the trust agreement by the guardian, the United States.

Under Question 5

The Court of Claims erred in failing to find and hold that the Indian Claims Commission had abused its discretion in this case in the following respects:

a. In failing to apply herein the same alternative measure of damages, the Commission adopted in its Order of March 17, 1976 (39 Ind. Cl. Comm. 499; Appendix J, par. 3, p. 121a), which the Court of Claims authorized it to do as an alternative measure of damages in *Seminole Nation v. United States*, 203 Ct. Cls. 637 (1974), and in its footnote 11, at page 654. In the *Seminole* case and this *Creek* case, the Commission and Court of Claims agree that there were unfair and dishonorable dealings involving the Government's breach of the "special fiduciary relationship" existing between the parties. Herein, the Government, as guardian, in executing the trust agreement gave away Creek tribal lands to third parties not entitled thereto. In determining the measure of damages to be awarded in the similar *Seminole* case, the Commission's Order of March 17, 1976, *supra*, adopted a combination of the fair market value for the lands as of the date lost, as well as the income therefrom lost to the Indian ward since that date. Thus, unless this case is remanded for equal treatment, unequal justice will result from this abuse of discretion.

b. In departing in this case from the long established precedent of the Commission of using as substantial evidence the valuable and relevant data contained in the soil surveys of the U. S. Department of Agriculture in determining the value of lands in Indian Claims cases. *Miami Tribe of Oklahoma, et al. v. United States,* 6 Ind. Cl. Comm. 513, 544, 546 (1938); *Miami Tribe of Oklahoma, et al. v. United States,* 9 Ind. Cl. Comm. 108, 125-126 (1961); *Lummi Tribe v. United States,* 10 Ind. Cl. Comm. 286, 302-303 (1962); *Northern Paiute Nation, et al. v. United States,* 16 Ind. Cl. Comm. 215, 223-230, 244, 247, 297, 300, 309 (1965); *Creek Nation v. United States,* 16 Ind. Cl. Comm. 431, 472 (1965); *Ponca Tribe of Oklahoma, et al. v. United States,* 20 Ind. Cl. Comm. 272, 275, 282 (1969). Herein the Commission refused to consider the valuable data relative to the Creek lands in question contained in the Soil Surveys of the U. S. Department of Agriculture of the Counties in Oklahoma created out of the Creek lands in question. Petitioner knows of no valid reason for the Commission's departure in this case from this long established precedent. In the cases cited above the same differences existed between the date of value and the date of the soil surveys. As the Commission stated with respect to the Soil Survey in the above cited case of *Northern Paiute Nation, et al. v. United States,* 16 Ind. Cl. Comm. 215 (1965), at page 309:

> "* * * After studying all the evidence we are convinced that the 1950 United States Soil Conservation Service report provides the best evidence for establishing a basis for a highest and best use land classification. However, we do believe that there was a limited deterioration in the land quality between the 1853 valuation date and the 1950 report. * * *".

c. In the Commission's disregard of the valuation of the surface of these Creek lands by the petitioner's appraiser, which was based upon the data relative to soils, climate, temperature, economics, etc., contained in the U. S. Department of Agriculture Soil Surveys of the relevant Counties in Oklahoma covering these lands (39 Ind. Cl. Comm. 383, 414; Appendix D, pp. 34a, 56a; Appendix K, pp. 125a-128a). This data, in the absence of private land sales on the open market, provides the best evidence of the attributes which go to make up the value of the lands in question. This method of valuation has been approved by the Commission and Court of Claims in many Indian claims cases. *Alcea Band of Tillamooks, et al. v. United States,* 115 Ct. Cl. 463, 493 (1950), reversed with respect to interest awarded, 341 U.S. 48 (1951); *Rogue River Tribe, et al. v. United States,* 116 Ct. Cl. 454, 478 (1950); *Otoe and Missouria Tribe of Indians v. United States,* 131 Ct. Cl. 593, 632-634 (1955); *Osage Nation v. United States,* 3 Ind. Cl. Comm. 217 (1954); *Ponca Tribe of Oklahoma, et al. v. United States,* 20 Ind. Cl. Comm. 272, 276-277 (1969).

d. In disregarding and failing to find the value of the surface of said lands involved, in accordance with values set forth in the Soil Survey of Muskogee County, Oklahoma, made by the U. S. Department of Agriculture, and issued August 4, 1915, on field operations of the Bureau of Soils in 1913, which in the absence of open market private lands sales, showed the surface values of said lands to be (Appendix L, p. 129a):

> "The value of farm lands ranges from $8 to $20 an acre for the sandy mountain soils,

from $40 to $100 for prairie land, and from $100 to $125 or more for the first and second bottom lands."

These surface values were shown by unrefuted evidence, to exist throughout the Creek Nation. The use of these average values for 21,777.21 of the 22,737.21 acres involved, and their application to the classification of the lands made by the Commission (39 Ind. Cl. Comm. 383, 417; Appendix D, p. 58a), results in a surface value of $1,310,548.04. This valuation is over three times the nominal value of the surface of these Creek lands as determined by the Commission, of $430,324.65, or $18.92 an acre. (Appendix D, p. 58a).

e. In disregarding the sole evidence in the record showing that the 960 acres of said lands, which the Commission determined were valuable for townsite purposes, had a value for said purposes of $1,186,000 (Appendix M, p. 130a); whereas, the Commission arbitrarily determined their value for this purpose to be the nominal amount of $48,000.00. (39 Ind. Cl. Comm. 383,417; Appendix D, p. 58a).

f. In concluding, contrary to the record, that the lands involved herein, located in Eastern Oklahoma, were "badly affected by the terrible 'Dust Bowl' of the 1930's" (39 Ind. Cl. Comm. 383, 390; Appendix D, p. 34a); whereas, these lands were many miles east of the Dust Bowl, the eastern limit of which was the 100° of west longitude (the beginning of the panhandle of Oklahoma). "The Yearbook of Agriculture, 1937", U. S. Department of Agriculture, pp. 41-42, states:

"The Critical Area

"The Great Plains comprise an area stretching from west central Texas to the border of Canada. On the west the Rocky Mountains are the border. On the east the region is irregularly delimited near the one-hundredth meridian, where formerly the short-grass country merged into the tall-grass or prairie country. In the critical area are the Texas Panhandle, the Oklahoma Panhandle, northeastern New Mexico, and all the northern portion of the Plains. Annual rainfall is low throughout the entire region. There are short, intense storms, wide fluctuations of temperature, and strong prevailing winds. Frost and snow make wind erosion a less serious danger in the north than in the south; but soil blowing and soil depletion occur throughout the region, particularly in the areas of excessive plowing."

g. In finding and holding, contrary to the record and inconsistent with its own findings, that these Creek lands "would not have been allotted had it been known that there were minerals beneath the surface. It was, in theory, the policy of the Department of the Interior to hold mineral lands for the benefit of all members of the tribe." (39 Ind. Cl. Comm. 383, 385, 411; Appendix D, pp. 29a, 53a); whereas, the Commission inconsistently found that "Federal officials and Indians alike believed that there was oil in Oklahoma. The Muskogee *Weekly Phoenix*, of November 2, 1899, had stated that there were great deposits of oil in Indian Territory. There were producing wells at Muskogee, Chelsea, and Bartlettsville, and vast potential

oil fields stretched across the Cherokee and Creek Nations." (39 Ind. Cl. Comm. 383, 421; Appendix D, p.62a).

h. In using as a basis for its valuation of the surface of said lands first sales of Creek Indian lands to whites through the respondent's office at Muskogee, Oklahoma, that were not open market sales, and were made at the time when respondent's administrative officers of the United States were dealing in the very lands they were then administering under the trust agreement (24 Ind. Cl. Comm. 238, 260-266; Appendix F, pp. 101a-108a). These sales were made upon low appraisals of the lands, and for extremely low prices, and did not reflect known oil or other mineral values. (39 Ind. Cl. Comm. 383, 406, 410-411, 415-416; Appendix D, pp. 52a-53a, 56a-58a).

i. In failing to find that in 1907 experienced oil operators were paying cash bonuses of $1,500 an acre for oil and gas leases in the famous Glenn Oil Field discovered in the Creek Nation in 1904-1905, in addition to a one-eighth royalty on all oil and gas produced from said lands (Appendix M, p. 130a); that three of the tracts involved herein were located in the middle of said field; and that had the petitioner been able to have leased said tracts, which contained 474.25 acres in the famous Glenn Oil Field in 1907, these three tracts alone would have netted the Creek Indian ward $1,453,794.43 in cash bonuses and royalties (Appendix M, p. 134a), well beyond the valuation for oil and gas determined by the Commission for all of the 142 tracts, of $550,000. (39 Ind. Cl. Comm. 383, 431; Appendix D, p. 73a).

j. In failing to find from the substantial evidence in the record that the 18 tracts involved herein, which the Commission found were located in the Cushing Oil Field (39 Ind. Cl. Comm. 383, 428; Appendix D, p. 70a), had

an estimated value as follows: The Barney Thlocco tract of 160 acres, $2,000,000; and the other 17 tracts in this field, $1,000,000 each. (Appendix M, pp. 131a-132a).

k. In failing to find from the substantial evidence in the record that the royalty of one-eight of the oil and gas produced from the 63 producing tracts, lost to the Creek Nation as the result of the Government's violation of its "special fiduciary relationship" to the Creek Nation, totaled $6,284,578.61 (Appendix M, p. 133a).

CONCLUSION

For the many reasons set forth herein, this petition for a writ of certiorari to the United States Court of Claims should be granted.

Respectfully submitted,

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